STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2004
v	No. 248705 Mecosta Circuit Court
DENNIS LYNN CARTWRIGHT, JR., Defendant-Appellant.	LC No. 01-004781-FH

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant Dennis Lynn Cartwright, Jr., appeals as of right his convictions by jury of possession of a short-barreled shotgun/rifle, MCL 750.224b, possession of less than 25 grams cocaine, MCL 333.7403(2)(a)(v), and failure to present a firearm for safety inspection, MCL 750.228. The trial court sentenced defendant to eleven months in jail and 36 months' probation. On appeal, defendant challenges the validity of the search warrant and the means used to obtain the information that served as the basis for the search warrant. We affirm.

Defendant's convictions stem from the execution of a search warrant at his residence in August 2001. On the incident date, defendant's landlord accompanied fire inspector Timothy Mortensen to the residence for purposes of conducting a routine annual rental inspection. During the inspection, Mortensen observed suspected marijuana and immediately called the Big Rapids police. Officer James Taylor responded and spoke to Mortensen about his observations. Officer Taylor then told Mortensen to continue with his inspection, and Taylor proceeded to consult with his supervisor about the situation. Later that same evening, Mortensen informed Taylor that while completing the inspection he observed additional suspected marijuana, a large sum of money, and two firearms in the residence. Officer Taylor, along with other officers, then entered the residence, secured the occupants, including defendant, and thereafter proceeded to obtain a search warrant.[1] During the ensuing search, the police seized evidence that was used to charge and convict defendant in this case.

[1] The legality of the entry and detainment of the occupants pending the issuance of a search warrant was the subject of a pretrial motion. However, that issue is not before us in this appeal.

Defendant first argues on appeal that the search warrant is defective. Specifically, defendant maintains that the search warrant affidavit contained insufficient facts to establish probable cause and that the affidavit improperly relied upon statements made by a third party who was not "thoroughly identified" and whose statements were not identified properly as being made with "'personal knowledge' of the factual information involved." We disagree.

The task of the issuing magistrate is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). The duty of a reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id*. at 238-239. Under this "totality of the circumstances" approach, an informant's veracity, reliability, and basis of knowledge are all highly relevant in determining the value of his or her report, but these elements are not "entirely separate and independent requirements to be rigidly exacted in every case." *Id.* at 230-231; see also *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000). The informant in this case was named. Named informants, as a general rule, are presumed reliable. *People v Powell*, 201 Mich App 516, 522-523; 506 NW2d 894 (1993). An affidavit based on information supplied by a named source must contain affirmative allegations that permit the magistrate to conclude that the informant had personal knowledge of the facts alleged. MCL 780.653(a); *Powell, supra* at 522.

In this case, defendant's claim that the search warrant affidavit was insufficient focuses on that portion of the affidavit wherein the affiant, Officer Taylor, states that Mortensen observed "plant-like material consistent with what Mortensen believed to be marijuana" and that Mortensen believed the material was marijuana because "Mortensen has seen marijuana on prior occasions and has some limited law enforcement training at Ferris State University D[epartment of] P[ublic] S[afety] in how to identify marijuana." Defendant complains that these averments are "totally conclusory in effect and tell the magistrate nothing." We find defendant's argument unpersuasive. To the contrary, we conclude that the information furnished to Officer Taylor by Mortensen and included in the search warrant affidavit clearly established that Mortensen was able to identify marijuana and that the substance was likely to be found at the residence where Mortensen was conducting his inspection. Moreover, from our review of the search warrant affidavit we are also satisfied that Mortensen was sufficiently identified in the affidavit and that the affidavit plainly reveals that the information that Mortensen supplied was based on personal observations.

Next, defendant alleges that Mortensen's observations while in the residence must be suppressed because he was a police agent conducting a warrantless search. We disagree. We review de novo questions of law, but a trial court's findings of fact are reviewed for clear error. *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003); *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001).

It is axiomatic that the Fourth Amendment guarantee proscribing unreasonable searches and seizures applies to government action and, conversely, "is not applicable to a search or seizure, even an unreasonable one, conducted by a private person not acting as an agent of the government or with the participation or knowledge of any government official." *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991).

In *McKendrick*, this Court further explained:

> To determine whether a given search is the type proscribed by the Fourth Amendment, two initial factors must be shown. First, the police must have instigated, encouraged, or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts. A person will not be deemed a police agent merely because there was some antecedent contact between that person and the police, and there is no seizure within the meaning of the Fourth Amendment when an object discovered in a private search is voluntarily turned over to the government. [*Id.* at 142-143 (citations omitted).]

Relying exclusively on the record evidence of Officer Taylor indicating to Mortensen at the conclusion of their first conversation that Mortensen should continue with his rental inspection of the premises, defendant maintains that Mortensen was a police agent. However, the record fails to support defendant's claim. Mortensen had no contact with any police officer prior to commencing his rental inspection. And although Officer Taylor told Mortensen that he could continue with his inspection, the only request made by Taylor to Mortensen was to report if anyone left the residence and if anyone removed packages. Nothing in the record provides a basis upon which to conclude that Officer Taylor at that point instigated or encouraged Mortensen to search inside the residence for contraband. Consequently, defendant's claim that Mortensen was a police agent conducting a warrantless search is without merit.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra